QSNTS

Queensland South Native Title Services

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Review of the Native Title Act 1993

Submission to the Australian Law Reform Commission on Issues Paper 45

TABLE OF CONTENTS

Introduction 3
Defining the Scope of the Inquiry 3
Connection Process in Queensland 5
Connection and Recognition Concepts in Native Title Law 16
Meaning of 'Traditional" and the Concept of Continuity 17
Presumption of Continuity 20
Authorisation and Joinder 20

Introduction

1. Queensland South Native Title Services ("QSNTS") makes this submission to the Australian Law Reform Commission ("the Commission") in relation to the Commission's review of the *Native Title Act 1993* (Cth) ("the Act"), in particular its focus on connection requirements and the barriers posed by authorisation and joinder provisions under the Act to claimants', potential claimants' and respondents' access to justice.

2. QSNTS is the Native Title Service Provider for the southern half of Queensland. It is a company limited by guarantee under the *Corporations Act 2001* (Cth), and funded under s 203FE of the Act to carry out the functions of a representative body as prescribed under the Act in its service area. The company has a representative land mass area of 1,170,000 square kilometres and represents 26 out of 39 native title claim groups in its service region in claims before the Court. QSNTS is run by a Board of Directors helmed by a Chairperson. It offers its clients and constituents a range of services including legal representation and research throughout the native title claims process.

3. QSNTS welcomes the public consultations on Issues Paper 45 ("IP 45") and the opportunity to make submissions on the vital and complex issues discussed. We encourage the Commission to make public available information relating to key issues which are identified during the consultation process so as to guide and inform further public discussion and debate of the issues.

4. QSNTS's submissions will not be responding to all 35 questions posed in IP 45. Rather our submissions will target specific reference areas which in our view are pertinent for process and practice improvements to the native title system and access to justice process. Otherwise generally our comments are cast in a broad sense to cover the field in relation to the Commission's inquiry.

Defining the Scope of the Inquiry

5. It is trite to state that the native title determination process is not one which bequeaths native title claimants with rights and interests. Rather, it is one which recognises and protects what has always been there – those extant native title rights and interests of our Aboriginal clients which arise under a normative system of traditional laws and customs. That this is so is reinforced by the overarching objectives in ss 10-11 of the Act.

6. The Preamble to the Act provides that the Act is intended to be a special measure, providing special procedures, "to rectify the consequences of past injustices" and secure "the adequate advancement and

protection of Aboriginal peoples and Torres Strait Islanders". In order to achieve this, it is recognised that the Act promotes **conciliation** and **negotiation**. It:

(a) supports the "just and proper ascertainment of native title rights and interests" by conciliation, and, if not, in a manner that has due regard to the *sui generis* nature of such rights and interests, "to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests and their rich and diverse culture, fully entitle them to aspire"; and

(b) encourages Governments, where appropriate, to facilitate negotiations on a regional basis:

i. with respect to the claims or aspirations Aboriginal peoples and Torres Strait Islanders have to lands, and

ii. with respect to proposals for the economic development of such lands.

7. The Preamble and Objects of the Act are fairly captured, we think, in the guiding principles identified by the Commission to inform this review. It is QSNTS's submission however that whilst admittedly the focus is a review of the Act and the native title process, the following guiding principles should also be discussed in parallel with any debates about how native title should be recognised and what the evidentiary thresholds for native title should be:

(a) the grand notion of 'Traditional Ownership'; and

(b) the facilitation or establishment of regional Alternative Settlement Frameworks, of like ilk as the Victorian *Traditional Owner Settlement Act 2010* (Vic).

8. Practitioners in the native title space are already aware of the difficulties that clients encounter when having to prove native title. For a lot of claimants, fighting the good fight may never result in a native title outcome. For some of them, a bare determination of rights with 'bucket loads of extinguishment' might be the most they can expect out of their claim for native title – hardly the recognition and status "their prior rights and interests and their rich and diverse culture, fully entitle them to aspire". So whilst a consent determination or a Court victory might provide formal recognition – for most it provides little else.

9. We suggest that recognition of Traditional Ownership status is a threshold already reasonably achieved with most native title claims - with the registration testing process carried out by the National Native Title Tribunal

("the Tribunal") and corollary processes instituted by the various States and Territories in relation to cultural heritage - adequately achieving that aim through the confirmation (via registration) of a *prima facie* case for 'right people, right country' of an area. The required 'carry-through', we submit, should be a link up with an alternative settlements system to build on that recognition / status to achieve some real, tangible outcomes in tandem with the native title claims process - outcomes that are of value to and empowering for the traditional owners and, reciprocally, that can provide certainty to and a positive legacy for negotiating governments.

10. QSNTS is unable to substantively comment in an informed way on any spatial or directional trends in the native title system, other than making its own anecdotal observations about how some matters - e.g. how the connection process has operated to date in Queensland (see below in [12] – [38]); how Applicants should act in relation to dealing with all matters arising under the Act; or how 'authorisation' meetings about changes to claim group composition should be notified and conducted – that affect its clients and constituents have been determined by various Courts or are operating in Queensland. It is noted that Question 2 might be too broadly framed at the moment to elicit any useful responses. We suggest that the Commission might wish to confine its inquiry to a few important specific matters and present some key data (with assumptions) from various jurisdictions in relation to each of those matters so as observations and comparisons about variables and sudden or gradual trends can be usefully made.

11. Our comments above apply equally to Questions 3 to 4 with respect to the inquiries about operational variations of the Act across Australia and potential consequences, as well as jurisdictional comparatives of the matters that are the subject of the Commission's review / inquiry.

Connection Process in Queensland

12. To the extent relevant for Question 2 with respect to our observations about systemic trends, QSNTS provides some comments in the following paragraphs on how the connection process operates in Queensland. In almost all circumstances, it starts with a native title claim group commencing legal proceedings via an authorised Applicant filing a native title determination application with the Federal Court of Australia ("the Court"). By commencing proceedings, the group accepts that it has the onus or burden to prove connection pursuant to its traditional system of laws and customs to all those lands and waters over which it has laid claim.

13. The Queensland Government's publically available policy position provides that the government favours resolving native title by consent through mediation.[1] It embarked upon this path in the second half of 1998, entering at the time in negotiations with the Queensland Indigenous Working Group ("QIWG")[2], the peak body that worked with and represented native title representative bodies ("NTRBs") in Queensland. It established Native Title Services ("NTS") in 1998 as a specialist area within the then Department of Premier and Cabinet as part of its strategy to deal with native title. It also entered into the *Building Reconciliation Protocol* ("Protocol") on 13 August 1999 to address matters which included the following:[3]

    (a) a statutory review of State cultural heritage legislation;

    (b) future act processes in Queensland;

    (c) a policy and legislative review of Aboriginal title to, and management of, conservation or green estates including national parks;

    (d) the use of the *Aboriginal Land Act* to assist in native title claims resolution; and

    (e) a review of the State's legislation with regards to land use, resource and land management.

14. Another paradigm shift in policy arrived in 1999 with the first release by the State of Queensland ("Queensland") of its *Guide to Compiling a Connection Report* ("Connection Guideline") in July 1999.[4] The Connection Guideline[5] "seeks to establish minimum parameters" aimed at assisting native title claim groups in proving their case for native title.[6] It is prepared predominantly for the use of expert consultants, such as anthropologists, in the preparation of connection reports that support claims for native title recognition.

15. For Queensland to agree to enter into substantive negotiations towards a consent determination, it must have sufficient evidence and argument from a native title claim group which support and satisfy the requirements of s 223 of the Act. The State receives such evidence via a connection report.[7]

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1 Queensland, *Guide to Compiling a Connection Report for Native Title Claims in Queensland* (2013) 1. See also http://www.dnrm.qld.gov.au/land/indigenous-land/native-title/information-for-claimants .
2 QIWG was an unincorporated association of Representative Aboriginal / Torres Strait Islander Bodies of Queensland pursuant to (the now repealed) s 202 of the *Native Title Act 1993* (Qld), the Aboriginal and Torres Strait Islander Commission, the Aboriginal Coordinating Council and the Islander Coordinating Council.
3 Western Australia, *Review of the Native Title Claim Process in Western Australia* (2001) 46 ("Wand Review").
4 Ibid 47.
5 Last updated in November 2013.
6 See above n 1.
7 Ibid.

16. QSNTS understands that a connection report is also a mandatory requirement by the government in Western Australia, for government participation in native title claims mediation. In Queensland, the connection report must conform to the Connection Guidelines in terms of content and structure. Its requirements ensure that the Queensland government, as the peak representative body for government instrumentalities, can be satisfied as to the cogency of the evidence upon which the applicants rely and that it is acting robustly to protect the interests of the State and the community generally.[8]

17. Most, if not all, native title claim groups in Queensland, choose to deliver a connection report to the State (as first respondent and principal administrator of all lands in Queensland) first for the purposes of assessment and entry into confidential negotiations to resolve the claim.

18. It is noted that a connection report is not a statutory requirement of the Act. It is a document prepared in response to Queensland government policy, specifically for a forum where litigant parties can agree to bargain in the shadow of the law albeit within the Court's residual overriding jurisdiction, to settle native title claims and / or deal with native title compliance issues (across the spectrum of historical, present and future land / water-related dealings). This approach keeps in step with the overarching objectives of the Act and we suggest represents tacit acceptance by all parties, not only native title claim groups, that resolving native title through negotiation is the best response to the interrelated problems posed by cost, delay and complexity in the conduct of civil litigation, particularly native title litigation. It is also used for the supplementary purpose of satisfying respondent parties and the Court ultimately as to the appropriateness of Orders sought under ss 87 / 87A of the Act.

19. Currently in Queensland, the Department of Natural Resources and Mines ("DNRM") is the lead agency in government for native title. Its responsibilities in relation to Indigenous land interests are managed by Aboriginal and Torres Strait Islander Land Services ("ATSILS"). The Claim Resolution section within ATSILS manages and negotiates native title claims. A sub-unit of Claim Resolution called the Connection Unit has principal responsibility for considering and assessing connection reports.

20. It is acknowledged that the connection report process is an opportunity offered by the State to and for native title claim groups to demonstrate connection facts that the latter seek to have recognised via determinations by the Court under s 225 of the Act. It is an exploratory tool for commencing discussions with respondent parties about the potential for reaching consent determinations in native title proceedings.

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[8] Dr Julie Finlayson, 'Anthropology and Connection Reports in Native Title Claim Applications' (Paper presented at the Native Title Forum, Brisbane, 1-3 August 2001, 3).

21. Queensland deals with all connection reports received on a "confidential" and "without prejudice" basis, unless otherwise agreed by the parties.[9] It expects that reports will address key legal concepts articulated by the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* [2002] HCA 58 ("Yorta Yorta") and *Western Australia v Ward* [2002] HCA 28 ("Ward"). Queensland's review or assessment process in relation to a connection report can take between 6 weeks to 3 months. QSNTS understands that the period of review depends on the State's prioritisation of a matter / claim, the availability of key personnel in both Crown Law and the Connection Unit to assess material, and other activities it might have on its books at any one time. We understand that the State's connection assessment process ordinarily involves the following steps:[10]

    (a) The report is forwarded to the Executive Director, ATSILS, for registration and review;

    (b) A senior anthropologist and / or historian from the Connection Unit in DNRM, and a Crown Law legal officer assess and review the report;

    (c) Where the Director of the Connection Unit is of the view, before the completion of the review, that matters have not been adequately addressed in the report, an opportunity will be provided to the native title claim group to address those matters;

    (d) Upon completion of the Unit's review of the report, a recommendation would be made to the Executive Director, ATSILS. This recommendation will advise, in some cases, that sufficient evidence exists upon which substantive negotiations towards a consent determination can commence. The Executive Director then provides this advice to the native title claim group.

22. For active participants in the system, the connection process presents and provides the following benefits:

    (a) given the *in rem* nature of a determination and the need to settle all positions once and for all and into future, the process provides certainty. The formal recognition of native title through a Court determination and registration of the latter on the National Native Title Register established and maintained by the Native Title Registrar at the Tribunal solidifies this position[11];

9 Ibid 3.
10 See above n 1, 4.
11 *Native Title Act 1993* (Qld) s 193.

(b) certainty as to the membership of the society - the identification of the native title claim group (and, ultimately, the native title holding group);

(c) precise identification and location of areas subject to the native title claim (ultimately and subject to extinguishment issues, the determination area);

(d) identification of the scope and nature of surviving native title rights and interests existing on and over various land parcels and waters in the determination area;

(e) the presentation of both lay and expert evidence as to the connections and associations of the native title claimants under traditional laws and customs to the claim area, and continuities to the present day; and

(f) the opportunities for the use and leveraging of such reports to highlight and accommodate - cultural concerns; traditional ownership of and responsibilities towards flora and fauna; traditional pharmacology and medical intellectual property; protection measures for significant cultural heritage; and steps to alleviate poverty, sickness, lack of educational outcomes and, social and economic disadvantage in Indigenous communities.

23. The State readily admits that for the purposes of without prejudice and confidential negotiations (rather than a hearing), a connection report will be "schematic and less detailed" than an expert report submitted for the purposes of a trial.[12] As such, it states that it "does not expect proof of continuity through evidence from every generation from first contact, but evidence from a significant number of sample generations … so that inferences can be drawn to establish the case for the maintenance of continuity".[13]

24. QSNTS notes that the connection process in Queensland has been largely successful, with 100 determinations to date,[14] however some gridlocks remain. We acknowledge, for the most part, the intent behind the process will be that the evidentiary threshold for the purposes of reaching agreement on the terms of a consent determination order will be lower than that required for trial. Whilst this might be the position in theory, it is QSNTS's observation this is not always the case in practice. On 15 August 2013, QSNTS received correspondence made on an open basis from ATSILS for the State advising on a recent 'development' in its requirements for connection material. The correspondence provided the following relevant advice:

12 Ibid.
13 Ibid.
14 National Native Title Tribunal, *Statistics about native title determinations* (as at 13 May 2014).

"…. In assessing connection material provided to it for the purposes of settling a native title claim, the State will now require specific evidence of connection to town and urban areas in order for it to be able to assess continuing native title connection for such areas.

The number and location of claims now being processed in Queensland for consent determinations have made the recognition of native title in town and urban areas an emergent issue for the State.

There is no hard and fast definition of what constitutes a town or urban area – only a common sense one of an area which contains a mixture of land interests and land uses in areas of closer settlement to an extent that the area is identified as a town or as an urban areas (*sic*).

Where the residential commercial and public uses of an area under claim are to such a degree that the area is identified as a town or urban area, the State's position is that evidence of continuing native title connection to that urban or urban area cannot rely upon an inference following from evidence of connection to claim areas outside that town or urban area.

The demonstration of connection to town and urban areas will evidence the same type of material addresses for demonstrating connection generally but it will need to be actual evidence relating to the town and urban areas and not evidence by inference. …"

25. Queensland's recent policy shift on connection requirements has now meant that QSNTS will have to engage in another time-consuming process and, expend additional and further resources, to obtain further tenure material, undertake preliminary tenure assessments, recalibrate its evidence gathering efforts and gather yet more evidence of connection. This is in relation to claims for which connection had already been accepted and which had been close to final resolution, as well as for those claims which are in the process of having evidence collected and prepared. Clients who may have gone through previous numerous interview and proofing sessions will have to endure another round of intense interviews so as Queensland's latest policy change and requirement with respect to **specific lot-by-lot evidence of connection in town and urban areas** can be complied with. QSNTS equates Queensland's latest strategy to a war of attrition waged unfairly by a well-resourced belligerent party on one of the most marginalised groups in society, with the objective it would appear of grinding the claim group down and extracting unfair concessions out of them. If ever there was a prime example of bad faith negotiations (for those claims close to finalisation), this is it. Given the proof quagmire that was *Bodney v Bennell* [2008] 03 FCAFC 70, the line of authorities presented in the cases,[15]

[15] See general course set in Full Court native title appeals determined since *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* [2002] HCA 58 ("*Yorta Yorta*") – namely *De Rose v South Australia* (2003) 133 FCR 325, *De Rose v South Australia (No 2)* (2005) 145 FCR 290 and *Northern Territory v Alyawarr* [2005] FCAFC 135 ("*Alyawarr*") – had departed from what had been

and the conciliation imperatives of the Act – the State's approach is selectively inconsistent, extremely unhelpful and, only promotes delay and unnecessary costs.

26. QSNTS understands that this issue has arisen in the Juru People's matter (QUD554 of 2010) on Justice Rare's docket. The Juru matter is set down for a consent determination on 11 July 2014. At the mention before Justice Rares on 1 May 2014, counsel appearing for Queensland confirmed that the State would be putting claimants to proof in relation to town and urban areas. QSNTS understands that the State is relying upon 'abandonment' rather than extinguishment to assert that native title does not exist in town and urban areas. Extracted below is the submission made at the mention by the legal representative for various pastoralists, outlining the risk, difficulty and confusion with the State's approach:[16]

> "….The issue that the State, as I understand it, has raised today, namely this issue of being able to draw inferences based on connection to one area and then whether you should extend it, on a geographical basis, is, as your Honour apprehends, one that is relevant to a number of claims in Queensland, and it does have some attraction to the parties that I represent. Well, what mystifies us is why the State is using township versus non-township as the distinguishing feature, rather than just looking at – I mean, the test that the State formulated, in our view, should apply to all the land in the claim area. There shouldn't be this zeroing in on a township, and saying, "Well, look, have you established connection there? We're prepared to make a broad general inference over all the pastoral that surrounds the town, but we're not going to give the benefit to the applications for the township."
>
> So from that point of view, the issue that the State is seeking to agitate does have implications for my clients, perhaps not so much in this claim because of its – the lay of the land, so to speak, and where the claimable land is, but certainly in other claims, this is an issue that will – that is relevant. The other issue I wish – the other matters I wish to raise today relate to the circumstances in which this afternoon's hearing has come about. The Act clearly encourages and emphasises consensual resolution of native title claims. And the parties that are before you have been participating in negotiations to see if a consent determination can proceed. However, each of us comes to it for different interests, and the one party that seems to have a unique role in this is the State.
>
> …

laid down in *Yorta Yorta*. Similar departures at first instance decisions: *Sampi v Western Australia* [2005] FCA 777, *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025 and *Bennell v Western Australia* [2006] FCA 1243 are also evident. See also the High Court in *Western Australia v Ward* (2002) 213 CLR 1, 207. Whilst it did not express its own view on appeal in the *Ward* matter as to the nature of connection required, it did say 'the fact that there has been no recent exercise of the right does not necessarily deny the possibility that native title can be established'.

16 Transcript of Proceedings, QUD554 of 2010 *Carol Prior & Ors on behalf of the Juru People v Qld & Ors*, 1 May 2014, 18-19.

> So as I said, we're attracted to the – there's some attraction in the State's analysis, based on the reasoning in Bodney v Bennell, about this, you know, has connection in reality been maintained to land? It's just that we're intrigued as to why the distinction is being made between township and non-township. And, really, what's claimable in many claims hinges on the haphazard history of the grants of extinguishing tenure, not how the land is used from block to block, or anything like that. So, yes, it's just, now, that your Honour is perhaps looking at this, there's a question of the timeline between now and July that causes me some concern as to what my clients might do, or might instruct me to do, if this issue is to be ventilated in a broader sense rather than limited to the actual townships that have been identified here.

27. QSNTS understands that His Honour has directed the State to put on submissions on 10 June 2014 to explain precisely what is meant by 'town and urban areas' and the jurisprudence that supports this new policy. We await His Honour's decision on the matter as the continuation of the policy has resource implications for QSNTS.

28. Another issue which generally arises in Queensland is the substance of the State's response about its assessment on connection, in particular the paucity of detail in those responses. With most claims, the State simply advises that connection has been accepted and it is willing to enter into substantive negotiations with the Applicant towards a consent determination.

29. In some, the State does not even indicate whether it has accepted connection, entering straight into indigenous land use agreement negotiations with the Applicant in relation to presumably what the State sees as its sovereign risk / land use / tenure needs imperatives, with a final CD hearing date tentatively scheduled confusingly as part of a timetable in 'mediation', and the Applicant negotiating in ignorance of where its claim stands on connection and where all its negotiation / bargaining chips lie or should fall. As we see that particular process, the State extracts what it requires from the claim group, drags the process out to the point of the matter being programmed for trial and the claim group, having not prepared for a trial thus far but faced with a package wrapped in conditions, has no other choice / fall-back position but to seriously consider accepting the package as offered by the State.

30. In others, the State advises that it is of the view the connection material does not satisfy the requirements of s 223 of the Act and is not willing to enter into substantive negotiations, in some cases with a further advice to the effect that the Applicant need not bother providing further connection material to the State.

31. The difficulty that claimants have with those statements is that the State does not indicate or provide the bases upon which it has reached a particular view. In those circumstances, the State's scant articulation of the

matters it has taken into account when reviewing connection is rather unhelpful in terms of it being vague rather than a statement of what precisely the issues are. There are no formal pleadings. No party makes formal admissions, other than statements made for the purposes of negotiations. Claimants flounder about in the dark attempting to interpret what the State's issues with their connection material are, providing yet further material and statements hoping they have 'hit the nail' this time, with the process tottering on until the State indicates it is ready to move to substantive negotiations or the matter is programmed for trial by an impatient Court and, pleadings are entered into. For one of our claims, the process took over two (2) long years from when connection was delivered before the State indicated it was ready to negotiate a consent determination. The process was time-consuming, expensive and emotionally draining for the clients.

32. It has to be said our clients go to considerable lengths, and a lot of resources are expended on their behalf, to prepare connection material evidencing their native title for delivery to the State. At the very least, they are owed the courtesy and dignity of a fulsome and upfront response on what the State's review of connection has revealed and a timely indication of what the issues are precisely. The problem as it appears to us is that a client's connection material has been prepared on the basis, amongst other things, of meeting Connection Guidelines prepared and required by the State for the purposes of reaching a negotiated agreement on native title. That in and of itself is problematic as it raises questions about the extent to which the connection material is implicitly shaped by assumptions within the Connection Guidelines about appropriate evidence and what standard of connection will be acceptable as indicative of connections between the claim group and the land.[17] Secondly, the State's assessment of the test requirements is not a transparent process with an option of being contested,[18] for example, their standard for what is an acceptable or requisite level of acknowledgement of traditional laws and observance of traditional customs has never been clearly articulated. It might be argued that these issues pose evidentiary matters that should be managed by the Court. Indeed in the absence of clarity and the possibility of failing to reach agreement on the issues, matters will have to resort to formal litigation. From QSNTS's perspective, it is very important that the State explicitly and promptly articulate the concerns and issues it might have with clients' connection material. Otherwise, it sees no other alternative but to advise clients to enter into a pleadings process early to extract those details out of the State.

33. A further worrying development over the past two (2) years has been the State's insistence on some ILUAs as an essential component of its consent framework. This is in the circumstance where the State indicates it will not consent to a determination of native title unless there is a signed ILUA on the table. We should add that a number of other respondents also insist upon this condition and it is not only the State that does it. In some cases, it is acknowledged and well understood that the requirement to explain clearly the relationship

17 Dr Julie Finlayson, 'Anthropology and Connection Reports in Native Title Claim Applications', above n 8, 7.
18 Ibid 9.

between the parties' rights and interests (taking into account the effect of the Act) and how they will operate on the ground post-determination as a necessary articulation of s 225(d) will be needed, particularly where consideration is provided and other things of value to the claimants such as freehold or other land title, land access, shares of land sales, training, capacity development funding, employment and business opportunities can be negotiated as part of the package. QSNTS is well aware that such ILUAs have the potential to make a real impact on the lives of native title beneficiaries.

34. In other cases though, principally with proposed 'stand-alone' template ILUAs over protected areas (national parks) or conservation estates which enumerate a number of things that native title holders can or cannot do, QSNTS is of the view they are neither needed nor required. This is especially so where they do not offer anything of value to the claimants / native title holders other than a further restriction of their hard-won native title rights. QSNTS submits that any native title determination:

    (a) will in such areas, after the countenancing of valid extinguishing acts, be limited to non-exclusive native title rights and interests;

    (b) will hold that the native title rights and interests will be subject to:

        (i) the traditional laws acknowledged and the traditional customs observed by the native title holders; and

        (ii) the laws of the Commonwealth and the State; and

    (c) will recognise "other rights and interests" existing on the determination area as at the date of the determination.

35. QSNTS submits and remains firmly of the view that for that type of ILUA, the State's rights and interests are already and more than adequately protected for by the existing legal regime - to which, subject to the exemption under s 211 of the Act, native title claimants / holders are already subject. It is noted that various pieces of legislation already exist to protect the interests of the State and the public, and cover the field in terms of any required regulation, e.g. the *Nature Conservation Act 1992* (Qld), *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Weapons Act 1990* (Qld), and the Nature Conservation (Protected Areas Management) Regulation 2006 (Qld) are cast in fairly unambiguous and unequivocal terms.

36. In the absence of any other adequate rationale as to why protected area ILUAs are required, one can only assume that the State is still promoting a model of 'colonial conservation' that still entrenches fierce prejudice against our clients, and that their rights, opinions and traditional knowledge are of little importance and concern to the government. It would appear that in taking the position articulated at [33], the State is, as per Justice Mansfield's comments in *Brown v South Australia* [2010] FCA 875 at [38], using the carrot of its consent as leverage to secure agreement on other matters.[19] From our experience, this aspect of the process presents as an unnecessary gridlock to timely consent determinations within our service region.

37. On a final point, QSNTS does not view proposed s 47C in the recently re-introduced Native Title Amendment (Reform) Bill 2014, the provision proposed for the disregarding of extinguishment in national park areas, as potentially assisting claimants in the regard presently discussed. Section 47C in our submission presents a further area of difficulty in the context that where the only historical / previous extinguishing act is the act of the Crown to reserve an area for / establish the protected area (national park), the possibility of both the State and native title holders having / reasonably sharing **control** of the protected area at the same time (particularly with, in some cases, the State's overlapping recreation areas management regime) is difficult to contemplate particularly in practice unless a framework ILUA process is entered into in parallel with the consent determination process. It is noted that for the provision to work optimally, the process will depend to a very large extent on the willingness of the State to agree to compromise its rights to control, administer and manage such areas. The process, such as it is, has at least a superficial patina of legitimacy in that the pre-conditions will be established legislatively. In such cases, there is arguably a greater measure of compliance accountability (preliminary tenure review and analysis) and due diligence (e.g. what other regimes / interests are affected?), although they in turn involve the risk of an undesirable politicisation of the process. Given the recent experience of the Quandamooka People when the Newman government enacted the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) with apparent indifference to the existence of the consent determinations in *Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741 and the registered ILUA the State itself had entered into with the Quandamooka People in 2011, such a process regretfully does not encourage certainty and / or great optimism amongst the clients.

38. In the final analysis in terms of how the connection process has worked thus far in Queensland, the aphorism – "the more things change, the more they stay the same" – in our experience still holds true. QSNTS suggests that the process in Queensland might be better improved by Applicants seeking timely orders from the Court to list a date for a final hearing as soon as connection is accepted and a timetable is settled upon by the

[19] See also comments by Justice Logan in *Gudjala People #1 v Queensland* [2013] FCA 787 at [42], in the context of an application for joinder.

parties. It is our experience that the State will **not** prioritise its resources and activities until the Court sets a date. In the absence of a listing date for final hearing, the matter might as well be in abeyance. Subject to whether ILUAs are part of the timetable, we suggest that there be strong insistence upon a negotiation timeframe of 6 – 12 months. A consent determination is reasonable achievable, in our view, in 6 months. The Kooma People #4 matter is evidence that where the Court applies rigour to a timetable / negotiation process and lists a date (in the absence of any other valid reasons as to why that might not be feasible), parties especially the State will marshall their resources to bring a matter to final disposition. The Kooma People #4 matter is listed for a consent determination hearing on 25 June 2014, just two (2) months after Justice Rangiah scheduled a final hearing. We further submit that the provisions regarding good faith negotiations in the Act also extend to negotiations which result in ss 87 / 87A agreements under the Act. Otherwise, we suggest that claimants might wish to seek orders to have the Court supervise or mediate ILUA negotiations directly, so as the parties are negotiating in good faith and the process is not 'marking time' or does not 'run off the rails'.

Connection and recognition concepts in native title law

39. On the question of whether s 223 of the Act adequately reflects indigenous understandings of connection to land, QSNTS suggests that it is difficult to state unequivocally that it does. The provision admittedly is a manifestation of the common law, drawing largely it appears from Justice Brennan's judgment in the High Court's recognition of native title in *Mabo v Queensland (No 2)* ("*Mabo*").[20] Without doubt, one must turn to the Act for determining native title. The authorities provide as much.[21] The recognition of the existence of native title and particularly connection is the product of the necessary interplay between s 223 and s 225 of the Act and the various persuasive interpretations of the Court in authorities to date of the requirements inherent in those provisions.

40. It is acknowledged that the bedrock principle of the law being a coherent unity means that the legislature cannot speak with a forked tongue. The issue of whether s 223 remains adequate today, however, as an indispensable check of what the current legal system is prepared to recognise of the indigenous legal system regarding indigenous proprietary interests in land is arguable. The law of native title has a long history traversing much common law, particularly laws about conquered and settled countries. It is presumptuous or indulgent, we say, to think that those preparing legislation will foresee all problems, solve all foreseen problems, or never create fresh problems by their own tampering of exposed legislative provisions.

[20] [1992] HCA 23; (1992) 175 CLR 1.
[21] *See Yorta Yorta* at 31-2; *Western Australia v Ward* (2002) 213 CLR 1, 16.

41. QSNTS observes that there is a marked disconnect between how most claimants in our region interpret 'connection' to country and how the law interprets or has evolved to interpret this concept. For most of our clients, the various technical manoeuvrings by the system to define, re-define and interpret who they are, where they are from, how they fit in their community, what they know / should know, what their cultures and connectedness to country should be are - by no equal measure and variously - sources of engagement, befuddlement, bemusement, ambivalence and frustration. Indeed in some quarters, e.g. the Aboriginal sovereignty movement, there is a palpable sense of a complete eschewing of the native title process. In those sections of the community, the process is viewed as imposed and one that they do not believe in. It is seen more as an exercise in egregious familiarity. The prospect of having to explain something which is entirely self-evident, with no guarantee that the outcome sought would ever be achieved is extremely demoralising, particularly if the outcome is such that a claim group is determined not 'native' enough – i.e. in who they are now, in the norms and customs they now practice, in how they have maintained connectedness to country and so forth. In those quarters, the technical and legalistic nature of the native title process exemplifies the spectacle of conforming and conceding to unchallenged perspectives of indigeneity which then morph into accepted orthodoxy in a system which seemingly entrenches iniquitousness. That position has some support amongst some claimants engaged in the system.

42. For QSNTS's clients, the judicial interpretations of connection to date remain complex and variable. They consistently affect the manner in which evidence is collected, conceptualised and presented. It has to be said claimants do not self-consciously conceptualise their laws and customs. They tend to simply live them. They know who they are, who their parents are, who their close kin are, where and which way is country, and how they relate to people and place. Indeed a broad and etic rendering of such bona fides could be said to include the following - the land, the law, the people, and the rights / obligations the people are entitled to / hold under the law, all underpinned by an overarching religious / spiritual system of indigenous cosmography and cosmology through which the land, the people and law were created and connected.

Meaning of 'Traditional' and the Concept of Continuity

43. In practice, proving connection invariably involves the much more complicated, costly, protracted and rigorous exercise of detailed inquiry into the interconnected elements of traditionality and continuity. Continuity remains 'the' big hurdle for native title claims. As practitioners in the native title space well know, the term 'continuity' does not appear in the Act although it is invariably linked with the word 'traditional' which figures most prominently in the definition of native title. The leading judgment of Gleeson CJ, Gummow and Hayne JJ explained in *Yorta Yorta* (at [45]) that as there was general acceptance the Act does not create new rights and

interests but rather refers to rights and interests with an origin in pre-sovereignty law and custom, the term 'traditional' in s 223(1)(a) and (b) must be read as referring (at [46]) not only to:

(a) generational transmission (usually by word of mouth and common practice) but also; and

(b) as conveying an understanding of the age of the 'traditions': see [49], [79], [86]; cf Callinan J at [191].

44. Their Honours also went on to identify a requirement (at [47]-[48]) that the normative system under which rights and interests are possessed must be a system that has had a continuous existence and vitality since sovereignty.

45. The difficulty with *Yorta Yorta* it appears is the duality of the voice of the Court in the judgment. In the space of five (5) paragraphs, their Honours both confirm the legal nullity, upon the acquisition of sovereignty, of the Aboriginal 'normative' legal system **and** demand its existence and vitality since that time. It is clear that the Court wrestled to declare itself with clarity and coherence - on the one hand, demanding a level of particularisation and specificity of rights and the normative system, including a high degree of conformity between the contemporary society, law and rights to its mirrored parts at sovereignty, with a declaration that no new rights / society can be created post- sovereignty (at [55]). On the other, providing a more tolerant voice - the plurality allowing that the 'profound effects' of European settlement on Aboriginal societies have brought 'great' and 'inevitable' change to societal structures and practices. The Court acknowledged that 'difficult questions of fact and degree may emerge' in the assessment of adaptability and change. Various important foundational and contextual aspects of the successful Mabo claim, particularly that the community was a quite adapted one however were ignored. Foundational aspects of the Act in the Preamble (that the Act is intended to be a special measure, providing special procedures, "to rectify the consequences of past injustices" and secure "the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders") were also ignored.

46. Those aspects of the connection inquiry – traditional and continuity – constitute, in QSNTS's submission, the inherent deficiencies with s 223. The nineteenth century view of indigenous culture as quaint, static and fundamentally confined must be incredibly offensive to indigenous peoples across Australia. The notion that upon settlement, all that the introduced law could and can ever recognise was a master copy of an indigenous legal system that existed at that point, from which successive generations of Aboriginal peoples across time have to be imprinted against so as the continuity of their acknowledgement and observance of traditional laws and customs can be said to exist still, is calculatingly limiting and creates injustices in the manner it is interpreted and applied.

47. Whilst QSNTS notes the system's allowances and opportunities since *Yorta Yorta* for fine judgment and the High Court's reluctance to set down doctrinal limits in relation to adaptability, change and degrees of permissibility (there being no 'single bright line test' for determining how the Court might draw inferences), it prefers the construct that implicit with the recognition established at the time of acquisition of sovereignty is an acceptance that the indigenous normative system of law was and is inherently capable of dynamism and resurgence from dormancy (not abandonment) as an index of what the system deems necessary from time to time to maintain its survival, legitimacy and relevance. The alternative is to insist on the maintenance and upholding of a type of classical system that in its anachronisms may not be able to face up to the challenges of modernity and the contemporary reality of indigenous lives, therefore eroding its vitality and further degrading indigenous peoples' connections to the land.

48. QSNTS has already discussed the Queensland connection process to date above. Connection for the purposes of s 223, as we have stated, remains unnecessarily complicated, fragmented and, inconsistently interpreted and applied in practice. It is our view that for a truly transformative process to occur in the native title space, a recalibration and reset are needed of the fundamentals. It is time to put the 'human' back in the centre of the 'rights' debate. The practice of further fragmenting and the bundling of rights which has developed to account for the effect of extinguishment and the clash of rights in our view is not required. Two reasons, we say, for ignoring fine grain distinctions of this kind are to reduce the cost of litigation so far as is practicable and to shorten the time it takes to move parties to a moderate centre on native title. We suggest leaving proposed rights as broadly framed as possible. There is also scope, we think, for a further development of the notion of reasonable co-existence of rights.

49. Whilst codifying the meaning of 'traditional' in s 223 might assist in clarifying and settling established parameters around connection, it is QSNTS's submission that given the common law's track record thus far of elucidation and expansion of the law in this regard, this reform idea is not necessary.

50. On the extreme end, it is suggested that s 223 be deleted entirely from the Act. This should allow the Courts, against the background of international customary law and comparative jurisprudence, to develop or re-interpret native title further. There is admittedly some circumspection around the suggestion given the complexity arising from the raft of common law decisions in the last twenty (20) years on native title cases. A moderate proposal in the alternative is to remove the word 'traditional' from s 223. QSNTS suggests that this proposal removes the time and scale priorities of the connection and continuity inquiry, which should pay huge dividends over time in terms of how efficient, economical and expedient the process will become.

51. A further suggestion for reform is to make clear under the Act that as long as there is unity as to the normative criteria in the system under inquiry, continuous physical residence / occupation of a place is not the only way to prove connection.

Presumption of continuity

52. QSNTS relies on its previous submissions on this proposed reform[22] and supports the submissions made by the National Native Title Council. We however make some additional observations in this submission. Whilst QSNTS supports the introduction of a presumption of continuity, it acknowledges that no decline in the requisite work to prove native title may occur, at least in the short to medium term upon the presumption's introduction. The elements required to prove native still remain and have not changed. We suggest that it is sound legal strategy for the claim group to still nevertheless prepare its material in case it needs to evidence facts required to be shown pursuant to ss 223(1)(a)-(b) of the Act in those circumstances where the State is able to provide evidence to rebut that presumption. In that sense and as a point of distinction, QSNTS does not view the proposal as lessening any of the work at the front of the process. Whether the presumption would influence the States and Territories to work more cooperatively with claimants and not undertake painstaking research to prove how claimants have not maintained continuity remain to be seen. Indeed, it is to be noted that no government party appears to have made known its position on the proposal. It cannot be assumed then that should the presumption option become law, that various governments would concede the point and not seek to put on evidence that would rebut the presumption.

Authorisation and Joinder

53. Authorisation meetings, their conduct and the consequences of decision-making by claimants and Applicants have dominated much of the attention of and case work for QSNTS in the last three (3) years.[23] It need hardly be stated that claim group meetings are, for traditional owners, an important feature of participatory decision-making through the principle of free, prior and informed consent, and inherently linked to the fundamental right of self-determination.

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22 See http://www.qsnts.com.au/index.cfm?contentID=29 .

23 See *Weribone on behalf of the Mandandanji People v State of Queensland* [2011] FCA 1169; *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255l; *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485; *Weribone on behalf of the Mandandanji People v State of Queensland (No 3)* [2013] FCA 662; *Weribone on behalf of the Mandandanji People v State of Queensland (No 4)* [2013] FCA 758; *Doctor on behalf of the Bigambul People v State of Queensland* [2010] FCA 1406; *Doctor on behalf of the Bigambul People v State of Queensland (No 2)* [2013] FCA 746 ("*Bigambul No 2*"); *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* [2013] FCA 1113.

54. Authorisation meetings at QSNTS are ordinarily convened after a public notification period of four (4) weeks, with the business to be dealt with at the meeting itemised on notices advertising the meeting and in correspondence forwarded to clients. Ordinarily, agenda items include - the making of a new native determination application; the appointment of an applicant to make the application and deal with matters arising under the Act in relation to it; proposed amendments to a current claim group description and / or claim area boundaries; the appointment of a replacement Applicant pursuant to s 66B or the appointment of an Applicant to make a claimant application on behalf of a newly described claim group; compromising a claim (that is, to take it to trial, withdraw or discontinue); the making of ILUAs or endorsement consent determination orders.

55. It is common knowledge that authorisation meetings are expensive and heavily process reliant, with procedural rules such as procedural fairness and natural justice featuring prominently in disputes that ultimately end in the Courts. Meeting procedure generally is governed by common law rules together with conventions that are modelled on parliamentary procedures as they have evolved historically.[24] It is noted that technical features of the law of meetings might not correlate well with decision-making processes that are incipiently traditional as aspects of the latter might not satisfy modern meeting procedures, and procedural fairness and natural justice requirements.

56. In our service region, amendments to the claim group have featured quite prominently, particularly the two-step process routinely followed by QSNTS in authorisation meetings to change claim group descriptions. Justice Reeves' decision in *Doctor on behalf of the Bigambul People v State of Queensland (No 2)* [2013] FCA 746 ("*Bigambul No 2*") highlights this two-step process, the importance of adequate notice and the requirement that meetings convoked to make decisions have to be properly conducted to ensure that members of the claim group have been provided every reasonable opportunity to participate in the decision-making process.[25] The decision-making process invoked must proceed on the basis of an informed consent or vote by those properly entitled to notice of the meeting of the claim group.[26] Backgrounded against those principles, the statements by Reeves J in *Bigambul No 2* are important to note (in the context of an earlier interlocutory application in that proceeding):

> Section 61 of the Act makes clear that the authority vested in the authorised applicant comes exclusively from the native title claim group on whose behalf the native title determination application is made. Further, the validity of that authority fundamentally relies upon the

[24] Elis S Magner, *Joske's Law and Procedure at Meetings in Australia* (The Law Book Company Ltd, 8th ed, 1994) 3.
[25] *Lawson v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 at [25] per Stone J.
[26] *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 at [45] – [46] per French J.

native title claim group following the authorisation process set out in s 251B of the Act. It follows that, if an existing claim group wishes to alter its composition, it must first meet as a whole and resolve to do that. If it does, then the new or reconstituted native title claim group must then meet and resolve in accordance with the process set out in s 251B to authorise an applicant to make a claim on its behalf under s 61.

57. Despite the law around authorisation meetings, the potential is reasonably high for vested interests to 'highjack' or derail the claims process by running authorisation meetings so as outcomes which would be congruent with their interests are achieved. The prospect for further disputation and litigation in the Courts where you have split interests and a split claim group arising as a result of such guerrilla tactics is a real and grave one. The lacuna in the Act enables third party interests who have no connection to the claim to receive instructions from an unhappy member of the claim group and advertise for an authorisation meeting of the claim group aimed at achieving a number of outcomes which are in the interests of the vested party. This has occurred in our service region a number of times. Invariably, the motivating factors are future acts and agreements, with the objective in our observation being entrenchment of extant positions and power bases so as control is maintained and benefits remain flowing. There is a sense with the rest of the claim group that nothing much can be done to rein in this abuse with the evidence required to seek injunctive relief proving difficult to obtain in most cases.

58. To improve the operation of provisions relating to authorisation and those relating to the authority to make decisions about a native title claim, QSNTS supports and proposes the following for reform:

    (a) The definition of 'native title claim group' in the Act needs to be clarified to make clear that it is **not** the social group comprised by a description in a native title determination application filed with the Court, the composition of which is defined by the terms of the description as appears in the Form 1 from time to time. Rather, we submit, it is the composition of "the native title claim group" as all the persons who, accordingly to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claims (s 66(1)), i.e. the claim group is not defined by what is written from time to time on the Form 1;

    (b) Section 62A should be amended to clarify and include the provisions that:

        (i) it is only the claim group, and not factional sections or vested interests within the group, that can provide directions or instructions to the Applicant. In saying this, it should not inhibit the claim group from utilising decision-making / authority structures within the group, such as family

representative steering committees or elders groups, to convey instructions in a representative sense;

(ii) the claim group can set the scope of authority / limits on the powers held by an Applicant in relation to the native title claim and their mandate to deal with matters arising under the Act; and

(iii) the Applicant can make decisions by majority vote.

(c) Section 251B should be amended to allow the claim group to autonomously and of its own volition choose a decision-making process of its choice to use at authorisation meetings. The amendment should clarify that the making of such a decision does not raise any matters for a s 223 inquiry;

(d) In the absence of statutory trusts, QSNTS proposes that the Act mandate or obligate registered native title claimants to **only** establish corporations for native title-related (and / or cultural heritage related) and relevant charitable purposes under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) on behalf of the claim group so as there is a greater measure of accountability to the claim group and scrutiny through governance structures and meetings about matters that the Applicant group might have dealt with or benefits which the Applicant would have received on behalf of the claim group. Future acts should be a matter that is included in a definition for "native title-related purpose" in this regard.

59. The subject of joinder has certainly made an impact in our service region. Most applications for joinder are made after the notification period by, in most cases, unrepresented joinder indigenous applicants. Despite the decisions made in the cases,[27] joinder applications regretfully have not diminished in numbers. The Commission's observation that filing numbers seemingly were intensified in Queensland and Western Australia over the last 3 years is interesting. Part of the issue, we submit, with indigenous respondents in our region is a lack of real understanding as to what is required to remain a party or to have a determination of native title made in their favour. The fact that indigenous respondents can only assert a defensive claim which does not assist them obtain a determination of native title in their favour is not well understood at all. What is seemingly understood is that one can simply file an application to oppose the claim in the form made. In that

27 *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 6; *Cheinmora v Western Australia* [2013] FCA 727 (25 July 2013); *Kokatha Uwankara (Part A) Native Title Claim v South Australia* [2013] FCA 856; *Davis-Hurst on behalf of the Traditional Owners of Saltwater v Minister for Land and Water Conservation (NSW)* [2003] FCA 541; *Isaacs on behalf of the Turrbal People v Queensland* [2011] FCA 828; *Far West Coast Native Title Claim v South Australia (No 5)* [2013] FCA 717 and *Starkey v South Australia* [2011] FCA 456.

sense, the exercise can be particularly time-consuming, frustrating and expensive for native title Applicants and claimants. QSNTS understands the intoxicating attraction that 'having your day in Court' to have a good vent and the undivided attention of the bar table and judge may have for joinder applicants however the impacts of having to deal with such distractions where particularly the authorities are against the joinder applicant cannot be understated. The resources required to deal with such respondents is, we say, disproportionate to the probative value of evidence or matters they raise in opposing a matter. Nowhere has this been more evident than the recent de-listing for a determination of the Court in the Bularnu Waluwarra & Wangkayujuru People's matter. That matter had been listed for a judgment date of 16 May 2014, and has had to be adjourned due to appeal actions arising from joinder applications that were refused by Mortimer J on 24 February 2014. For the Bularnu Waluwarra & Wangkayujuru People, this has been an extremely disappointing development.

60. As suggested improvements to this area, QSNTS submits and suggests the following:

    (a) That the meaning of "Affected persons" under s 84(3) of the Act be clarified to disentitle members of the claim group from joining as respondents;

    (b) That s 50A(2) be examined further to determine whether any clarification around the term "unreasonable act" should be defined to include joinder applications that are made late; and

    (c) That the s 84 provisions be amended to include an automatic right of party status for representative bodies as is the case with State / Territory governments in s 84(4). This ensures that the representative body can choose to withdraw at any time or, **subject to conflict issues being satisfactorily dealt with**, remain a party in suitable cases where its statutory functions could be availed upon to assist the Court and indigenous parties. In the alternative, that s 84A be amended to also provide representative bodies an automatic right to join as intervener in a claim proceeding.

61. QSNTS thanks the Commission again for the opportunity to provide comments and proposals. We look forward to further discussions and the publication of the Discussion Paper in September.